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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 596

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON, *Petitioner,*

against

MERRITT-CHAPMAN & SCOTT CORPORATION, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S REPLY TO THE BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*

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Preliminary Statement

Respondent Merritt-Chapman & Scott Corporation (M-C&S) received the brief of the Attorney General of the State of New York (Attorney General), as *amicus curiae*, in support of the Petition only after M-C&S's brief in opposition had already been served and filed. Because the Attorney General has misstated the question presented in this case and because he has raised several new points not argued in the Petition, M-C&S is submitting this short reply brief.

Clarification of the Question Presented

By the omission of facts central to a decision of this case, the Attorney General has stated the question pre-

sented in such oversimplified terms as to be misleading. The only way the argumentative question set forth by the Attorney General (*Amicus* Brief, pp. 1-2) could be related to the instant case is by the addition of at least the following language, shown in italics:

> "May a plaintiff commence an action in New York *for breach of a contract made in New York* against a public instrumentality of another State simply by attaching that instrumentality's New York bank deposits, *which have been segregated from the general revenues of the public instrumentality and deposited in New York for payment of its obligations under the contract upon which the suit has been brought, where the attachment will not substantially interfere with the instrumentality's performance of its public duties*, thereby * * *" (*ibid.*; words in italics added by M-C&S).

Indeed, the Attorney General has never once acknowledged that this is an action upon a contract made in New York involving the interpretation of New York practice and remedial statutes, an action with which, in the words of the court below, New York has "substantial contacts" (Appendix A to Petition, p. 56a). Nor has the Attorney General apparently understood that this case does not involve a municipal corporation's budgetary estimates or an attachment of its general funds but an attachment of segregated funds which are not available for the municipal corporation's general public functions, such funds having been specifically appropriated for the payment of its obligations under the contract which is the subject of this suit.

New Matters Raised by the Attorney General

a) The Interests of the State of New York

The Attorney General argues that the interests of New York State are adversely affected in that: 1) out-of-state instrumentalities may transfer funds from New York

banks to banks in other states; 2) funds of New York public bodies may be subject to attachment within New York State; and 3) funds of New York public instrumentalities in other states may receive less protection. (*Amicus* Brief, pp. 5-6).

Little need be said about the speculative possibilities set out as 1) and 3), *supra*. They were properly described by the court below as "farfetched" (Appendix A to Petition, p. 56a). Indeed, they are incomprehensible since the courts of other states have since 1935 considered New York courts to be "too liberal in their treatment of a foreign municipal corporation's creditors" in attachment suits, see *Eastern Union Co. v. Moffat Tunnel Improvement Dist.*, 178 Atl. 864, 871 (Del. 1935); and there is no evidence whatsoever that the New York financial community or New York public bodies have been adversely affected by this out-of-state recognition of New York policy sanctioning the attachment of the funds in New York of a foreign municipal corporation.*

The Attorney General's second concern, *i.e.*, the possible attachment of funds of New York governmental units within New York, shows unfamiliarity with the record and with what was decided by the Court of Appeals. No such issue was presented to or decided by the court below.

b) The Venue of this Action

The Attorney General argues that the State of Washington has by statute restricted the forum in which suits may be brought against its instrumentalities (*Amicus* Brief, p. 3) and that it "is unthinkable that New York would disregard Washington's policy." (*Id.*, p. 9). Con-

* The Attorney General's predictions as to the consequences of the Court of Appeals' decision involve, basically, legislative considerations. If future events demonstrate that the Attorney General's fears are not "farfetched", he has ready access to the New York State legislature which, by a minor change in the practice statutes involved, can grant whatever relief may then be appropriate.

trary to the Attorney General's argument, the highest court of the State of Washington has construed the statute relied upon by the Attorney General (*id.*, p. 3) to concern only the procedural matter of venue and to raise no substantive jurisdictional issues. *Public Utility District No. 1 v. Puget Sound Power & Light Co.*, 260 P. 2d 315 (Wash. 1953). A venue provision of this kind has no extraterritorial application. *Tennessee Coal, Iron & RR. Co. v. George*, 233 U. S. 354 (1914). As the court below pointed out, the question whether a foreign governmental body can be sued in New York State has been settled by New York courts in the affirmative since 1899; see Appendix A to Petition, page 57a, fn. 4.*

To cite *Kilberg* v. *Northeast Airlines*, 172 N.E. 2d 526 (N. Y. 1961) and *Pearson* v. *Northeast Airlines*, 309 F. 2d 553 (2d Cir. 1962), *cert. den.* 372 U. S. 912 (1963) in support of an argument that New York courts would deny M-C&S a remedy is unsound (*Amicus* Brief, pp. 10-11). In those cases, the state and federal courts permitted New York remedial policy to override the clear provisions of Massachusetts statutory law. Their combined effort is to undercut fatally the Attorney General's argument here.

Dated: December 5, 1963.

Respectfully submitted,

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* The validity of the attachment and levy is a constitutionally procedural matter for New York conflict of law purposes, and New York would not defer to any policy of the State of Washington. See Appendix A to Petition, page 29a and Respondent's Brief, page 11.